Supreme Court, U.S.
FILED
03 - 16 JUN 26 2003

No. _____

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether this Court should resolve the three-way circuit conflict regarding whether a district court is forbidden to consider the circumstances of a defendant, including changed medical conditions, as they exist at the time of a resentencing.

(2) Whether the Seventh Circuit erred in holding—in avowed conflict with the Fifth Circuit—that 18 U.S.C. § 1014 criminalizes the making of false statements, unrelated to lending transactions, to federally insured institutions.

RULE 29.6 STATEMENT

Petitioner Robert R. Krilich, Sr., is a private party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr. respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's decision affirming petitioner's conviction but vacating his sentence and remanding (App., *infra*, 10a-28a) is reported at 159 F.3d 1020 (7th Cir. 1998). The district court imposed petitioner's final sentence on a subsequent remand in an unreported order. App., *infra*, 3a-9a. The decision of the Seventh Circuit on appeal of that sentence *(id.* at 1a-2a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 2002. See *id.* at 1a-2a. On January 27, 2003, the Seventh Circuit denied petitioner's request to rehear the case *en banc*. See *id.* at 29a-30a. By order dated April 18, 2003, this Court extended petitioner's time to file this petition to June 26, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1014 is entitled "Loan and credit applications generally; renewals and discounts; crop insurance," and makes it a crime to "knowingly make[] any false statement or report * * * for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan."

STATEMENT

Petitioner seeks review of two legal rulings by the United States Court of Appeals for the Seventh Circuit. First, the court of appeals held that a district court, in resentencing a defendant, may not consider changed circumstances as they relate to any

issue decided on a prior appeal. In this case, the district court was deemed forbidden to consider the precipitous decline in petitioner's health because the court of appeals had previously addressed petitioner's entitlement to any health-related sentencing departure in a prior appeal. See App., *infra*, 1a-2a. The courts of appeals have adopted three conflicting standards: some forbid consideration of changed circumstances; others permit or even require it; and the Seventh Circuit alone permits considering changed circumstances only if the sentencing issue was not considered on a prior appeal.

Second, the Seventh Circuit majority held that 18 U.S.C. § 1014, which criminalizes the making of false statements to influence federally insured banking institutions, applies to "transactions other than loans." In reaching that conclusion over the dissent of Judge Ripple, the Seventh Circuit rejected the contrary holding of the Fifth Circuit, which refused to construe Section 1014 to prohibit essentially all false statements to lending institutions and thus to intrude on the traditional domain of state criminal law. It is undisputed that, in the Fifth Circuit, petitioner could not have been prosecuted under Section 1014.

1. Petitioner was convicted of fraud and conspiracy to violate RICO in connection with the issuance of industrial revenue bonds to finance petitioner's construction of approximately 1200 housing units. App., *infra*, 11a. Petitioner was sentenced to 64 months' imprisonment. At sentencing, the district court departed downward seven levels from the otherwise applicable Guidelines range because the estimated financial benefit to petitioner from his misconduct overstated the seriousness of his offense. *Id. at* 23a. Petitioner appealed his convictions, and the Government cross-appealed from the district court's downward departure at sentencing. The Seventh Circuit affirmed the convictions but vacated petitioner's sentence because the district court's benefit calculation was impermissibly vague. *Id.* at 26a-27a.

The court of appeals, *inter alia*, affirmed petitioner's conviction under 18 U.S.C. § 1014. The statute, entitled "Loan and credit applications generally," makes it a crime to

"knowingly make[] any false statement or report * * * for the purpose of influencing in any way the action of * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." Petitioner's conviction was based on the withdrawal of funds held in trust in the bank that petitioner had raised from the sale of Industrial Revenue Bonds to third parties. The court of appeals held that the statute criminalizes petitioner's conduct, even though "the withdrawals of the trust funds were not lending transactions" and despite the fact that the banks faced no financial exposure whatsoever because petitioner's statements involved the withdrawal of *third parties'* assets. App., *infra*, 19a-21a. The Seventh Circuit acknowledged the directly contrary holding of the Fifth Circuit in *United States* v. *Devoll*, 39 F.3d 575 (1994) (per Politz, C.J.), that Section 1014 "applies only to statements made to obtain loans or other extensions of credit," but rejected the reasoning of *Devoll*, concluding that the "text of the statute is straightforward and broad," and therefore resort to legislative history or the rule of lenity was unnecessary. App., *infra*, 19a-21a.

Judge Ripple dissented with respect to Section 1014. He would have adopted the Fifth Circuit's holding that Section 1014 "applies only to *lending activities* by the financial institutions protected by the statute." App., *infra*, 27a (emphasis added). According to Judge Ripple, this reading of the statute is dictated by "the Supreme Court's explicit determination" in *Williams* v. *United States*, 458 U.S. 279 (1982), that Section 1014 was intended to provide "'penalties for making false statements or reports in connection with loans or other similar transactions.'" Because the "funds held by the bank in this case involved no extension of credit," Judge Ripple would have found the statute "inapplicable." App., *infra*, 28a.[1/]

[1/] The court of appeals also rejected petitioner's contention that the use of a pre-trial proffer against him violated Fed. R. Evid. 410. App., *infra*, 12a-16a. The Seventh Circuit's holding has been rejected by at least one district court (see *United States* v. *Chaparro*, 181 F. Supp. 2d 323, 336 (S.D.N.Y. 2002) (recognizing the conflict)) and the question is now pending before the

2. Based on new findings on remand, the district court concluded that the applicable Guidelines range was 135 to 168 months. By the time of his resentencing in early 2000, however, petitioner's physical and mental health had declined. He accordingly sought a downward departure based on his advanced age (then 69, and now 72) and his deteriorating physical and psychological condition. See Krilich's Response to Presentence Investigation Rep. & Mem. in Aid of Sentence (1/26/00) at 23-29. The district court received medical evidence showing that appellant suffered from a series of serious infirmities. Dist. Ct. 11/1/00 Op. at 7. Invoking U.S.S.G. § 5H1.4, the court granted a five-level departure based specifically on petitioner's "four major illnesses"—"cardiovascular disease, peripheral vascular disease with hypertension, obstructive pulmonary disease and back disease/lumbar and lumbosacral origin." *Id.* at 10. With the departure, the court imposed a term of 87 months' imprisonment. *Id.* at 11.

3. Petitioner appealed from another aspect of the sentencing order, and the Government cross-appealed from the five-level downward departure. The Seventh Circuit held that the district court's decision to depart downward on the basis of petitioner's age and infirmity could not "be reconciled with" the Guidelines, including particularly Section 5H1.4, which limits departures to cases of "extraordinary physical impairment." *United States* v. *Krilich*, 257 F.3d 689, 693 (2001). Having rejected the basis for the district court's downward departure, the Court remanded the case with a specific mandate to resentence "in the range of 135 to 168 months." *Id.* at 694.

4. After the Seventh Circuit remanded, but prior to any resentencing proceedings, petitioner's health declined even more dramatically. In August 2001, petitioner suffered a nearly fatal acute atrial fibrillation (uncontrolled, rapid, and irregular heart rhythm). That condition arose because petitioner suffered

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Second Circuit. If a circuit conflict develops during the pendency of the petition, petitioner will move for leave to amend to present that question to this Court.

a severe bowel obstruction, producing "abdominal pain, nausea, vomiting, and inability to hold down liquids and medication." App., *infra*, 4a-5a. Prison officials did not treat the condition as serious, but inexplicably only gave him Pepto-Bismol. His condition deteriorated rapidly. 2/14/02 Tr. 59, 98-99, 149-151.

Petitioner suffers from numerous medical conditions, requiring an array of medications.[2/] His unchecked and untreated vomiting prevented him from keeping any of his medications down. His psychotic depression and attendant symptoms as a result became "increasingly severe." 2/14/02 Tr. at 14, 46-47. Even more critically, the vomiting left petitioner extremely dehydrated, placing great stress on his cardiovascular system and producing an acute atrial fibrillation. *Id.* at 98-100. Finally, FMC personnel took petitioner by ambulance to the intensive care unit at a local hospital. His cardiac rhythm was unstable but—after unsuccessful attempts by hospital personnel to shock his heart back to a stable beat—was ultimately normalized with medication. *Id.* at 98-99. The damage to petitioner's heart and cardiovascular system was permanent. App., *infra*, 5a. As hours of unrebutted medical testimony established, petitioner "sustained an irreversible and permanent predisposition to heart abnormalities in the future." 2/14/02 Tr. 99-100. He has "a much higher likelihood of a significant cardiac event, which would be a heart attack, an

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[2/] Petitioner now takes more than 20 medications for his various ailments, and at the time of his resentencing took at least 16: (1) Nitroglycerin (for angina); (2) Atenolol (for high blood pressure and angina); (3) Lisinopril (for high blood pressure); (4) Lovastatin (for high cholesterol and triglyceride levels); (5) Doxazosin Mesylate (for high blood pressure and benign prostatic hyperplasia); (6) Bupropion (for depression); (7) Paroxetine (for obsessive compulsive disorder, panic disorder, and social anxiety disorder); (8) Seroquil (antipsychotic agent for emotional or mood disorders); (9) Buspar (for depression); (10) Gabapentin (for seizures associated with epilepsy); (11) Levothyroxine Sodium (for hypothyroidism); (12) Timolol (for glaucoma); (13) Doxycycline (for adult periodontitis); (14) Potassium Chloride (for treating/preventing low blood potassium levels); (15) Albuterol Inhaler (for treating/preventing symptoms of asthma, emphysema, and other breathing conditions); and (16) Aspirin (for prevention of blood clots, heart attacks, and strokes). Mem. in Support of Motion for Downward Departure at 2-4 (and 10/23/01 Chronological Record of Medical Care, attached thereto).

arrhythmia, or heart failure." *Id.* at 106. "Witness what happened in August when he nearly died." *Id.* at 123.

Petitioner's heart condition is exacerbated by his worsening mental illness. Petitioner suffers from a major depressive disorder (which is psychotic from time to time), obsessive compulsive disorder, panic attacks, and severe anxiety. 2/14/02 Tr. 3, 10, 11. And, as noted, petitioner's inability to keep his medications down caused his psychotic depression to become "increasingly severe" (*id.* at 14, 46-47), aggravating his already serious heart problems (*id.* at 15).

The upshot is that petitioner has a drastically reduced life expectancy. The combination of petitioner's coronary disease and his severe depression will "substantially shorten" petitioner's life. 2/14/02 Tr. 116-118. The best estimate is that he had (at the time of the resentencing hearing) five (or at most eight) years to live, well below the life expectancy for men his age. *Id.* at 31, 34-36, 116-118.

The medical testimony also demonstrated that petitioner's imprisonment severely aggravates his condition. He "would be more effectively treated" outside of prison, where "[t]here would be better coordination between those physicians who are involved in his psychiatric [care] and those who are involved in his cardiac care or his general medical care. That kind of coordination is not occurring in the prison." 2/14/02 Tr. 43-44. By contrast, his "current environment * * * will lead to disastrous health consequences." *Id.* at 120.

5. Petitioner sought a downward sentencing departure on remand based on two Guidelines: his age and infirmity (§ 5H1.1) and his extraordinary physical impairment (§ 5H1.4). See Mem. in Support of Motion for Downward Departure at 4; 2/13/02 Tr. 31-33. The district court held a hearing on petitioner's motion for downward departure on February 14, 2002, limited to the intervening circumstances occurring "since August [2001]." 2/13/02 Tr. 32.

In reaching its sentencing decision, the district court credited the doctors' testimony that petitioner suffers from a severe cardiac condition and that the interplay between this

condition and petitioner's clinical depression would likely shorten his life. See 2/14/02 Tr. 175 ("Yes, depression plus serious heart illnesses will shorten his life span"). The court concluded, however, that petitioner had not shown that he would live any longer outside of prison. App., *infra*, 8a-9a. Petitioner accordingly failed to persuade the court that imprisonment would shorten his life span—something the district court believed was necessary to show an "extraordinary physical impairment" for a § 5H1.4 departure.

Critically, the district court held that its finding that petitioner lacked an "extraordinary physical impairment" under § 5H1.4 necessarily foreclosed relief for his "age and infirmity" under § 5H1.1. The court concluded that a defendant can be "infirm" under § 5H1.1 only if he has the sort of "extraordinary physical impairment" that qualifies for § 5H1.4 relief. See, *e.g.*, 2/14/02 Tr. 172. The district court thus believed that there was a single "showing that must be made to warrant a departure under [either of] these provisions." App., *infra*, 7a. The court concluded that, because appellant had not qualified for § 5H1.4 relief, he was also ineligible for a departure under § 5H1.1. 2/14/02 Tr. 168. The district court accordingly denied appellant's motion for downward departure and imposed a sentence of 135 months' imprisonment. *Id.* at 179-180.

6. On appeal, petitioner argued that the district court applied the wrong legal standard by subsuming the § 5H1.1 standard within § 5H1.4. Petitioner explained that the district court's holding misread the Seventh Circuit's previous decision in the case, ran afoul of well-entrenched canons of construction, and conflicted with decisions by the Seventh Circuit and other courts distinguishing between § 5H1.1 and § 5H1.4. The Seventh Circuit never addressed these arguments, however, holding that the district court lacked authority even to consider a downward departure based on petitioner's deteriorating health: "The last time the case was here, we concluded that the evidence did not warrant any reduction in sentence under U.S.S.G. §5H1.1 or §5H1.4." App., *infra*, 2a. The court's mandate on remand was "'to impose a sentence in the range of 135 to 168 months,'" and the district court therefore "had no authority to impose a sentence lower than the one

[petitioner] received." *Ibid.* (emphasis added). In the court of appeals' view, an intervening change in governing law might have justified broader proceedings on remand, *ibid.*, but an intervening change in fact did not.

After the Seventh Circuit denied rehearing and rehearing en banc (App., *infra*, 29a-30a), this Petition followed.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted to resolve two important conflicts among the courts of appeals. First, the Seventh Circuit in this case applied its rule, not followed by any other circuit, that a resentencing court may consider changed circumstances *only* if the circumstances do not bear on an issue already addressed by the court of appeals. The Fourth, Eighth, and Tenth Circuits take the more restrictive position that a district court on resentencing may consider only the facts as they stood at the time of the original sentencing, while the First, Second, Third, Fifth, Sixth, and D.C. Circuits hold that any changed circumstance may be considered by the resentencing court. Under the latter position, which is the correct view in light of this Court's precedents and the structure of the Sentencing Guidelines, petitioner would have been entitled to argue for, and ultimately to receive, a sentencing departure that accounts for the dramatic deterioration in his physical condition.

Second, the Seventh Circuit held that 18 U.S.C. § 1014, which governs "loan and credit applications," applies to statements made to federally insured banks in connection with transactions unrelated to lending. This position, subsequently adopted by the Sixth and Ninth Circuits, squarely conflicts with the holding of the Fifth Circuit in *United States* v. *Devoll*, 39 F.3d 575, 580 (1994), that under *Williams* v. *United States*, 458 U.S. 279 (1982), Section 1014 "applies only to actions involving lending transactions." Given that petitioner's conviction was based on transactions unrelated to a loan or credit application, the court of appeals' decision to reject *Devoll* was outcome determinative. Because the federal government is disabled by *Devoll* from bringing prosecutions in the Fifth Circuit asserting that Section 1014 was violated by statements unrelated to lending transactions, disparate treatment of

defendants under the statute is guaranteed absent this Court's intervention.

ARGUMENT

I. The Courts Of Appeals Are Hopelessly Divided Over District Courts' Authority To Consider Changed Circumstances At Resentencing.

This case squarely presents an issue that has deeply divided the courts of appeals—whether and when a district court may consider changed circumstances in resentencing a defendant. See generally *United States* v. *DeRiggi*, 893 F. Supp. 171, 180-181 (E.D.N.Y.) (noting circuit split), aff'd, 72 F.3d 7 (2d Cir. 1995) (per curiam). The Seventh Circuit's rule is that district courts may consider changed circumstances *only* to the extent that they do not relate to an issue already decided by the court of appeals. See *infra* pp. 10-11. That holding implicates a three-way circuit conflict that merits this Court's review. A minority of circuits go even further than the Seventh Circuit, holding that resentencing is limited to the facts as they stood at the time of "the first [sentencing] hearing." Most circuits take the opposite approach: they permit or even require consideration of changed circumstances no matter what the issues resolved by prior appeal.

A. Three Circuits Require Courts To Ignore Intervening Circumstances When Resentencing A Defendant.

The Eighth Circuit in its often-cited *Cornelius* ruling expressly limits the resentencing calculus to the facts as they existed when the defendant was originally sentenced: "Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue *that it could have heard at the first [sentencing] hearing*." *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992) (emphasis added). Developments since the original sentencing are out of bounds. See *United States* v. *Sims*, 174 F.3d 911, 913 (8th Cir. 1999) (relying on *Cornelius* for rule that post-sentencing developments are irrelevant at resentencing).

The Fourth and Tenth Circuits have adopted the same rule. In *United States* v. *Bell*, 5 F.3d 64, 67 (4th Cir. 1993), the Fourth Circuit quoted *Cornelius* for the proposition that, so long as the court of appeals' mandate permits it, a district court on resentencing may "entertain[] 'any relevant evidence * * * that it could have heard at the first hearing.'" See also *United States* v. *Apple*, 962 F.2d 335, 336-337 (4th Cir. 1992) (district court properly concluded that circumscribed appellate mandate foreclosed consideration of changed circumstances at resentencing). Likewise, in *United States* v. *Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994), the Tenth Circuit held that even in a case of "fully de novo resentencing" a district court may only consider "'relevant evidence the court could have heard at the first sentencing hearing'" (citing *Bell* and *Cornelius*); see also *United States* v. *Warner*, 43 F.3d 1335, 1340 (10th Cir. 1994) (same). "[E]vents arising after that time are not within resentencing reach." *Warner*, 43 F.3d at 1340; see also *United States* v. *Moore*, 83 F.3d 1231, 1234 (10th Cir. 1996) (same); *United States* v. *Davis*, 182 F.3d 1201, 1202 (10th Cir. 1999) (same).[3/]

B. The Seventh Circuit Has Adopted A Hybrid Approach.

The Seventh Circuit has not adopted the categorical rule of the Fourth, Sixth, and Eighth Circuits. Unlike these courts, the Seventh Circuit to some extent permits district courts to consider "extraordinary unforeseen events occurring after the original sentencing." *United States* v. *Buckley*, 251 F.3d 668, 670 (7th Cir. 2001). But this rule is limited. District courts may not consider changed circumstances bearing on an issue that the court of appeals has already adjudicated. The Seventh Circuit thus reads *Cornelius* narrowly, emphasizing that its limitations apply only where the court of appeals has already

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[3/] Although the case did not involve any intervening circumstances, the Eleventh Circuit has quoted *Cornelius* with approval for its rule that, "'[o]nce a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing.'" *United States* v. *Jones*, 36 F.3d 1068, 1070 (1994).

addressed a ground for departure on which the defendant again relies at resentencing: "'[T]he district court can hear any relevant evidence on *that* issue [*i.e.*, the one already considered by the court of appeals] that it could have heard at the first hearing.'" *United States* v. *Polland*, 56 F.3d 776, 779 (7th Cir. 1995) (emphasis in original) (cited in *Buckley*, 251 F.3d at 669). Here, the Seventh Circuit found that it had previously rejected petitioner's poor health and advanced age as grounds for departure; the court's limited application of *Cornelius* meant the district court could not revisit these issues, notwithstanding the dramatic, intervening change in petitioner's condition. App., *infra*, 2a.

C. Other Circuits Recognize District Courts' Authority To Consider Changed Circumstances At Resentencing.

Several circuits reject the *Cornelius* rule outright and allow (if not require) district courts to consider any changed circumstances when resentencing a defendant. In *United States* v. *Core*, 125 F.3d 74, 76-79 (2d Cir. 1997), the Second Circuit held that district courts should consider rehabilitation that defendants achieved after their original sentencing.[4/] The court

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[4/] Like the Second Circuit's opinion in *Core*, some of the decisions discussed herein involved alleged post-conviction rehabilitation. The Sentencing Commission ultimately addressed this particular issue in a Policy Statement, effective November 1, 2000, prohibiting courts from departing on the basis of "[p]ost-sentencing rehabilitative efforts." U.S.S.G. § 5K2.19. This in no way affects the sweeping rules, discussed above, that circuits have established for dealing with post-sentencing developments generally. Indeed, *Core* itself makes plain that its rule is not limited to claims of post-sentencing rehabilitation. See 125 F.3d at 77 (reasoning that, had defendant "rendered assistance to the government by cooperating since his initial sentence, we see nothing in the statutes or the Guidelines that would have precluded the court from taking that conduct into account" at resentencing); see also *United States* v. *Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002) (discussing availability of departure for extraordinary family circumstances arising since original sentencing), cert. denied, 123 S. Ct. 2246 (2003); *United States* v. *Cox*, 2001 WL 920260, at *10 (E.D.N.Y. Aug. 3, 2001) (court is "permitted, if not obliged," to consider post-appeal conduct inconsistent with acceptance of responsibility claim), aff'd, 299 F.3d 143 (2d Cir. 2002).

stated broadly that, "[w]hen the trial court undertook to resentence [the defendant] * * * it was *required* to consider him as he stood before the court at that time." *Id.* at 77 (emphasis added); see also *Werber* v. *United States*, 149 F.3d 172, 178 (2d Cir. 1998) ("the district court was required to resentence [the defendant] in light of the circumstances as they stood at the time of his resentencing").

The Second Circuit recognizes district courts' power to consider changed circumstances even where (as was arguably true in petitioner's case) the mandate on remand is otherwise narrowly circumscribed. See *United States* v. *Bryce*, 287 F.3d 249, 253 (2d Cir.) ("'even where the appellate court remands a case with specific limiting instructions, such a mandate does not "preclude" a departure based on intervening circumstances'"), cert. denied, 123 S. Ct. 117 (2002); *United States* v. *Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (per curiam) ("This Court has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing," even where the court of appeals remanded for the limited purpose of "'resentenc[ing] [defendant] according to his original offense level'"). In short, "even when a remand is limited, an issue may be raised if it arises as a result of events that occur after the original sentence." *United States* v. *Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002), cert. denied, 123 S. Ct. 2246 (2003). The *Quintieri* court elaborated:

> If, for example, a woman whose spouse cared for their young children is convicted of a crime, she might see little point in seeking a downward departure pursuant to § 5K2.0 of the Guidelines on the basis of extraordinary family circumstances. If, between her first and second sentencing, her spouse were to die unexpectedly, however, we do not doubt that she could raise the issue of extraordinary family circumstances in a second sentencing following remand even though the remand was "limited" to a different issue.

Id. at 1230; see also *United States* v. *Carpenter*, 320 F.3d 334, 341 n.7 (2d Cir. 2003) ("a downward departure for the detrimental effect of incarceration on others could be based on

events occurring after [the defendant] was first sentenced"). The district court in *United States* v. *Tichio*, 1999 WL 47325, at *4 & n.1 (S.D.N.Y. Feb. 1, 1999), thus considered "post-conviction rehabilitation and/or other extraordinary circumstances which allegedly have occurred subsequent to [defendant's] conviction and sentence," including "*medical grounds*" (emphasis added).

In stark contrast to the Seventh Circuit rule, moreover, the Second Circuit requires district courts to consider changed circumstances even when they bear directly on a legal issue already addressed by the court of appeals. In *Bryson*, the Second Circuit vacated a departure for extraordinary rehabilitation and remanded for the limited purpose of resentencing the defendant without the benefit of that departure. 229 F.3d at 425-426. On a subsequent appeal, the court held that, despite its prior determination that the defendant had not shown sufficient rehabilitation, the district court was free to depart on that basis again on remand if intervening circumstances warranted. *Id.* at 426 (limited remand "did not foreclose the possibility * * * of a rehabilitation that might occur between our decision and the resentencing. This Court has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing").

In addition to the Second Circuit, five other courts of appeals likewise recognize district courts' authority to consider changed circumstances at resentencing.[5] See *United States* v. *Bradstreet*, 207 F.3d 76, 82 & n.6 (1st Cir. 2000) (expressly rejecting *Cornelius* rule and permitting district courts to

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[5] Ninth Circuit case law is internally inconsistent. Compare *United States* v. *Green*, 152 F.3d 1202, 1206-1208 (9th Cir. 1998) (district court may consider intervening circumstances in resentencing defendant); and *Rewak* v. *United States*, 512 F.2d 1184, 1186 (9th Cir. 1975) ("It is a common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence"), with *United States* v. *Matthews*, 278 F.3d 880, 889 (9th Cir.) (en banc) ("we have created exceptions to our general rule that the district court resentence de novo to 'preclude consideration of post-sentencing conduct'"), cert. denied, 535 U.S. 1120 (2002).

resentence based on developments since original sentencing); *United States* v. *Sally*, 116 F.3d 76, 79-81 (3d Cir. 1997) (allowing consideration of intervening changes); *Puente* v. *United States*, 676 F.2d 141, 145 (5th Cir. 1982) ("'it is a common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence'"); *United States* v. *Rudolph*, 190 F.3d 720, 724 (6th Cir. 1999) ("'It makes no sense to preclude a sentencing judge from considering facts pertinent to resentencing that had not yet arisen at the time of the original sentence'"); *United States* v. *Akrawi*, 982 F.2d 970, 973 (6th Cir. 1993) (noting that district court considered "several facts which had changed since the first sentencing" when resentencing the defendant)[6]; *United States* v. *Rhodes*, 145 F.3d 1375, 1378-1382 (D.C. Cir. 1998) (district court can consider new developments); *United States* v. *Dyce*, 975 F. Supp. 17, 20-22 (D.D.C. 1997) (departing downward based on circumstances arising since defendant's original sentencing, *including substantial decline in health*).[7]

As these courts recognize, allowing district courts to

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[6] Unlike the Second Circuit, however, the Sixth Circuit holds that a narrow mandate on remand can preclude any such consideration. See *Rudolph*, 190 F.3d at 726, 728.

[7] An April 2003 amendment to 18 U.S.C. § 3742 does not resolve the circuit split. New language provides that, on remand for resentencing, a district court "shall not impose a sentence outside the applicable guidelines range except upon a ground that—(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and (B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure." 18 U.S.C. § 3742(g). The amendment does not address changed circumstances, as it easily could have, and there is no reason to think that Congress considered and resolved an issue so contentious among the courts of appeals and overturned settled Supreme Court jurisprudence *sub silentio*. The amendment is meant merely to prevent district courts on remand from using new sentencing theories as pretexts for reimposing departures overturned on appeal. See, *e.g.*, H.R. Conf. Rep. No. 108-66, at 59 (Apr. 9, 2003) (new section is intended to "prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory"). There is nothing pretextual about a court's reliance on actual, changed circumstances in resentencing a defendant.

consider changed circumstances at resentencing is true to the Guidelines and governing statutes: "The principle that a defendant is sentenced as he stands before the court derives partly from the Guidelines requirement that relevant conduct must be taken into account in setting a defendant's Guidelines range." *Bryce*, 287 F.3d at 253 (citing U.S.S.G. § 1B1.3(a)); see also *Rhodes*, 145 F.3d at 1381 (reasoning that rule is consistent with federal statutory scheme). It is also absolutely essential if sentencing is to account rationally for the defendant's circumstances, particularly given that the condition of aged and infirm defendants can deteriorate quickly, as in this case.

This rule also follows from the Court's decision in *Koon* v. *United States*, 518 U.S. 81 (1996), which allows sentencing courts to consider any factor not expressly prohibited by the Guidelines. *Id.* at 109 ("a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor"); see *Bradstreet*, 207 F.3d at 81-82; *Rudolph*, 190 F.3d at 722-723; *Green*, 152 F.3d at 1207-1208; *Rhodes*, 145 F.3d at 1378-1379; see also *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969) (recognizing "[t]he freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence"), overruled in part on other grounds, *Alabama* v. *Smith*, 490 U.S. 794 (1989); cf. *Sell* v. *United States*, No. 02-5664, slip op. 18-19 (June 16, 2003) ("the Government should [evaluate petitioner for possible forced medication on remand] on the basis of current circumstances," because petitioner's "medical condition may have changed over time").

There are also powerful policy reasons to consider a defendant's changed circumstances at resentencing, particularly where the defendant is elderly and increasingly infirm. Imprisonment is a uniquely harsh experience for such inmates, a fact that effectively increases their punishment. At the same time, the rapidly growing number of aged and infirm inmates in the federal system poses mounting fiscal and logistical burdens. See, *e.g.*, *United States* v. *Baron*, 914 F. Supp. 660, 664 (D.

Mass. 1995) ("Keeping infirm elderly people behind bars can cost up to three times more than imprisoning younger offenders"); Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates Are Literally Dying to Get Out of Prison*, 17 J. Contemp. Health L. & Pol'y 687, 687 (2001) (Federal Bureau of Prisons predicts 16% increase in population of inmates over 50 between 1998 and 2005). These costs seem especially burdensome in light of the low likelihood of recidivism. Molly F. James, Note, *The Sentencing of Elderly Criminals*, 29 Am. Crim. L. Rev. 1025, 1027 (1992) ("the infirm elderly person is least likely to commit crimes in the future").

Working under the proper rule, the Seventh Circuit would have had to address the fact that the district court made obvious errors at petitioner's resentencing. In the end, the fact that petitioner was sentenced in the Seventh Circuit (rather than one of the six circuits adhering to the majority rule) meant that he was denied the opportunity to receive a downward sentencing departure based on the precipitous change in his condition.

II. Certiorari Should Be Granted To Resolve The Entrenched Circuit Conflict Over Whether 18 U.S.C. § 1014 Criminalizes Misstatements Unrelated to Lending Transactions.

Certiorari is also warranted because this case presents a square conflict over the proper construction of 18 U.S.C. § 1014, which governs "loan and credit applications" (title). Section 1014 makes it a crime to "knowingly make[] any false statement * * * for the purpose of influencing in any way * * * any institution the accounts of which are insured by the Federal Deposit Insurance Corporation." The Seventh Circuit majority's holding that Section 1014 applies to "transactions other than loans" or other extensions of credit intrudes markedly into the traditional domain of state criminal law, for it extends the statute to encompass essentially any false statement, whatever the context, to a banking institution. The decision below also openly conflicts with the Fifth Circuit's holding in *United States* v. *Devoll,* 39 F.3d at 580, that "section 1014 applies only to actions involving lending transactions."

In *Devoll*, the court of appeals explicitly rejected as inconsistent with Section 1014 the district court's jury instruction under which the defendant was convicted because he made a false statement merely "for the purpose of influencing some action to be taken by" a federally insured bank. The Fifth Circuit canvassed the "statutory language" and "legislative history" of Section 1014, concluding that the statute applies only to "false representations * * * made to influence" the bank's "lending activities." 39 F.3d at 579.[8/] Confronted with precisely the same issue in this case, the Seventh Circuit took the opposite view. The panel majority rejected petitioner's argument that he did not violate Section 1014 because "the withdrawals of the trust funds were not lending transactions," declining "to follow *Devoll*." App., *infra*, 19a.

The circuit conflict over the proper construction of Section 1014 is outcome determinative of many criminal prosecutions, including this one. Petitioner's conviction was based not on a loan from funds owned by a bank but on the withdrawal of funds that he had raised from the sale of Industrial Revenue Bonds to third parties, withdrawals that cannot on any view be characterized as loans or the extension of credit. As the trial court found and as federal law requires (see 12 U.S.C. § 92a(c)), the banks' trust departments were entirely separate from the banks' lending activities. Therefore, if this case had arisen in the Fifth Circuit, petitioner's conviction would have been reversed under *Devoll* because it was based on actions entirely unrelated to lending transactions.

The conflict is also frequently recurring. The government brings numerous prosecutions under 18 U.S.C. § 1014, and therefore the courts of appeals are frequently called upon to decide the scope of the statute. See, *e.g.*, *United States* v. *Lane*, 323 F.3d 568 (7th Cir. 2003) (Section 1014 applies to failure to disclose information on loan refinancing application); *United States* v. *Tierney*, 266 F.3d 37 (1st Cir. 2001) (false personal

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[8/] Though the Fifth Circuit ultimately affirmed the defendant's conviction on the ground that the jury instruction in that case was not "plain error," *Devoll* stands for the proposition that Section 1014 "relates only to lending activities." *United States* v. *Boren*, 278 F.3d 911, 916 (9th Cir. 2002).

financial statement); *United States* v. *Hicks*, 217 F.3d 1038 (9th Cir. 2000) (filing false financial returns to obtain business loan); *United States* v. *Jenkins*, 210 F.3d 884 (8th Cir. 2000) (false credit card sales slips); *United States* v. *Koh*, 199 F.3d 632 (2d Cir. 1999) (false application for letter of credit). The broad interpretation given to Section 1014 by the Seventh Circuit in this case would extend the number of transactions covered by the statute even further. *E.g.*, *United States* v. *Boren*, 278 F.3d 911 (9th Cir. 2002) (stop payment request); *United States* v. *Wade*, 266 F.3d 574 (6th Cir. 2001) (checking account application).

The irreconcilable holdings of the Fifth and Seventh Circuits have created a conflict that requires this Court's intervention. A leading treatise notes "uncertainty as to the scope of section 1014," with the decision in this case calling into question the "traditional view" espoused in *Devoll* that "the statute only applies to statements made for the purpose of influencing the bank in its lending activities." Modern Federal Jury Instructions ¶ 37.03 (2002).

Petitioner presented the circuit conflict in his petition for certiorari from the Seventh Circuit's ruling in the initial appeal in this case. This Court denied certiorari (528 U.S. 810 (1999)), most likely because the conflict was not mature at that point. As Judge Ripple noted in dissent, at that time *Devoll* did not stand "in opposition to the positions of" circuits other than the Seventh, because other circuits interpreting Section 1014 had all applied the statute to "situation[s] involving the bank's function of extending credit." App., *infra*, 27a (Ripple, J., dissenting in part) (citing *United States* v. *Yoo*, 833 F.2d 488, 489 (3d Cir. 1987)); *United States* v. *Bonnette*, 781 F.2d 357, 359 (4th Cir. 1986)). Therefore, the positions of the other circuits were still "in harmony with the Supreme Court's explicit determination that the statute was designed to provide 'penalties for making false statements or reports in connection with loans or other similar transactions.'" *Id.* at 28a (quoting *Williams* v. *United States*, 458 U.S. at 289-290). It accordingly remained possible that the Seventh Circuit, which at that time stood alone in its rejection of the traditional view of Section 1014 adopted by the Fifth Circuit in *Devoll*, would later

revisit its position. But in the intervening four years, the conflict with the Fifth Circuit's position has only grown more substantial as other circuits have embraced the Seventh Circuit's reading of Section 1014. See *United States* v. *Boren*, 278 F.3d at 915-916 (citing *Krilich*); *United States* v. *Wade*, 266 F.3d 574, 580 (6th Cir. 2001) (same).[9/]

The conflict is thus intractable. In ordinary civil litigation, or even with respect to certain questions of criminal law, it arguably would be reasonable to await a later case in the Fifth Circuit to determine whether that court would adhere to its position. That option is critically unavailable in this context, however, for the *Devoll* ruling precludes the government from ever initiating a prosecution under Section 1014 in the Fifth Circuit with respect to activities not related to lending transactions. It is therefore all but impossible for a case to present the Fifth Circuit with an opportunity to reaffirm or reconsider its position. This dispute over the proper interpretation of Section 1014 means that criminal defendants in different parts of the country will *indefinitely* receive inconsistent treatment under the statute depending on the geographic location of the activities with which they are charged. That result is untenable.[10/]

Certiorari is furthermore warranted because the Seventh Circuit's ruling is inconsistent with this Court's decision in *Williams* v. *United States*, 458 U.S. 279 (1982). In *Williams*,

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[9/] Even on the Sixth and Ninth Circuits' broader reading of Section 1014, petitioner would have been acquitted, because in *Boren* and *Wade* the banks at least faced the possibility of suffering financial losses.

[10/] The Government's contention that Section 1014 encompasses all false statements to federally insured banking institutes parallels its contention in other cases that the federal bribery statute, 18 U.S.C. § 666, applies to all bribery of employees of state and local governments that receive federal funding. In both instances, the federal government's construction causes federal criminal statutes to intrude considerably upon the territory of traditional state criminal law without any explicit Congressional mandate. A circuit conflict has arisen with respect to Section 666 that parallels the conflict over the proper interpretation of Section 1014. See, *e.g.*, *United States* v. *Sabri*, 326 F.3d 937 (8th Cir. 2003) (citing cases).

this Court held that check kiting is not proscribed by Section 1014, reasoning that the text and legislative history precluded reading the statute as extending the federal criminal law to "a wide range of conduct" that "traditionally has been regulated by state law." *Id.* at 290.

The *Williams* Court emphasized that nothing in the legislative history suggested that the statute "should be applicable to anything other than representations made in connection with conventional loan or related transactions." *Id.* at 288-289. The legislative history of Section 1014 and of subsequent amendments have characterized the statute "simply as 'relating to false statements *in loan and credit applications*.'" *Id.* at 289 (quoting H.R. Rep. No. 1457, 91st Cong., 2d Sess. 21 (1970)) (emphasis added); see also *id.* (Section 1014 was "designed primarily to apply to borrowers from Federal agencies or federally chartered organizations" (quoting S. Rep. No. 1078, 88th Cong., 2d Sess. 4 (1964)); *id.* at 290 (statute "provides penalties for making false statements or reports in connection with loans or other similar transactions" (quoting H.R. Rep. No. 1556, 91st Cong., 2d Sess. 35 (1970)). Given this silence in the legislative history regarding non-loan transactions, the Court concluded that the rule of lenity does not permit "a broad[] reading of the statute."

The reasoning of the *Williams* Court, largely ignored by the court of appeals in this case, strongly suggests that the Fifth Circuit's reading of Section 1014 is the correct one. Like *Williams*, *Devoll* refused to read Section 1014 more broadly than the text requires, and thus to intrude upon the traditional domain of state criminal prosecutions, without stronger support in the legislative history. See *Devoll*, 39 F.3d at 580 ("With this [legislative history] we are not persuaded that the statute imposes liability whenever a defendant's false statement was intended to interfere with any activity of a financial institution"). Indeed, the *Devoll* court noted that, under the construction subsequently adopted by the Seventh Circuit in this case, Section 1014 "presumably would encompass fraud or false representations having nothing to do with financial transactions," such as a fraudulent *employment application*. 39 F.3d at 580. That was precisely the sort of broad reading that

the *Williams* Court cautioned against in light of the parsimonious legislative history.

Compounding its error, the Seventh Circuit relied on an inference from the structure of the statute that this Court disclaimed in *Williams*. The Seventh Circuit reasoned that Section 1014 must apply to transactions other than loans because the statute "deals with misstatements to" institutions that do not make loans. Because "the Office of Thrift Supervision and other listed bodies are just regulators," the court reasoned that if "their inclusion in the statute is to have meaning," Section 1014 must apply to "statements that are not designed to influence an extension of credit," indeed, to statements "that have nothing to do with the payment of money." App., *infra*, 20a-21a. In *Williams*, however, this Court recognized that the institutions cited by the Seventh Circuit were added by amendments that "attracted little attention in Congress and were dealt with summarily." 458 U.S. at 288. Therefore, according to the *Williams* Court, "[w]hile Congress has added and subtracted certain institutions to and from the list covered by Section 1014 over the intervening years, no changes have been made in the type of transactions proscribed by the provision." *Ibid.* To assume, as the court of appeals in this case did, that the addition of institutions such as the Office of Thrift Supervision to Section 1014 in 1990 broadened the scope of transactions covered by the statute flies in the face of this Court's reading of the relevant legislative history.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2003